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In the Supreme Court of the United States

OCTOBER TERM, 1972

ANDREW GEORGE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Andrew George, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1973. A timely Petition for Rehearing was denied on May 31, 1973 (Appendix B). The jurisdiction of this Court was invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Government proved knowledge and intent on the part of the defendant George of a scheme to defraud Zenith.

2. Whether the Court properly refused the theory of defense instructions.

3. Whether the Court erred in admitting evidence of Zenith conflict of interest policy.

STATEMENT OF FACTS

The indictment charged the defendants with mail fraud (Title 18, U.S.C. §1341) in that the defendant, Greensphan, paid various "commissions and kick-backs" to the defendant, Yonan, through the defendant, George, thereby depriving Zenith 1) its lawful money and property, and 2) the honest performance of Zenith's employee Yonan. (Tr. 13, 593-595). In arguing against the defendant's motion for a directed verdict the prosecutor characterized the fraud involved as Zenith's "loss of Mr. Yonan's honest services, and, secondly through the conversion of secret profits by Mr. Yonan . . ." (Tr. 250).

The evidence taken in the light most favorable to the government proved the following basic facts about the alleged scheme to defraud.

1. Yonan was a buyer for Zenith.

2. Greensphan (Accurate Box Corporation) was a cabinet supplier for Zenith since 1963.

3. During 1967, 1968, 1969, 1970 and 1971 Greensphan supplied over 300,000 cabinets for a Zenith product known as the 'circle of sound'.

4. Zenith paid Greensphan for these cabinets.

5. A & G Woodworking, George's company, submitted various invoices to Greensphan for varying amounts of money in 1968, 1969 and 1970.

6. Greensphan paid these invoices which totaled over $300,000 dollars.

7. George paid over $100,000 to Yonan during 1968, 1969 and 1970.

8. Zenith had a policy against payments by its suppliers to its employees.

These basic facts were supplemented by the following evidence.

Zenith had what it termed a 'product committee' consisting of members of the engineering, sales and purchasing departments. This committee met weekly to discuss and select new models designed by Zenith stylists. After a model was presented, discussed and selected it would then be referred to the engineering department in order that blueprints might be prepared. These blueprints were then sent to various suppliers for bids. (Tr. 53-59, 73-74, 268-270 and 370). The request for bids would also enclose a standard Zenith quotation form with listings for the cost of materials, labor, freight and overhead and disclosure of profit. (Defendant Greensphan's Exhibit 1 (Tr. 76, 288-289, and 373). When a bid is received it would be reviewed by

various members of the purchasing department, including Yonan, Cardis, Yonan's supervisor, Maloney, and the individual buyer, as well as representatives from the engineering and sales departments. (Tr. 58-59, 76-80, 375-376, 392, and 398). The supplier was chosen in these conferences. (Tr. 80). Yonan would then send out the blueprints and, if the price were too high, negotiate it to an acceptable level. (Tr. 73) [1]

In placing a purchase order Zenith would issue what it termed a release which specified the quantity and delivery date of the product ordered. Yonan had nothing to do with this or the figures on it. The decision as to both quantity and delivery date, as well as price, rested with the sales department. Yonan's responsibility was to place the order and follow it through (Tr. 80-82, 292-293). The ultimate responsibility for negotiating bids and purchase orders with cabinet suppliers in 1966, 1967, and 1968 was Maloney's. (Tr. 86-87).

The "circle of sound" orginated in the Zenith engineering department in 1966. (Tr. 268, 429). As originally conceived it was to be a veneer cabinet. However, this proved too costly. (Tr. 404, 429, 368). Zenith tried various ways to make a cabinet according to the original design but were unable to do so and eventually contacted Accurate Box. (Tr. 370 and 427). Bugella and Greensphan met with Maloney and possibly Yonan to discuss the feasibility of this product. Maloney told them the problem Zenith was having and asked them to look into the matter and see if

[1] This was the witness Maloney's (Yonan's supervisory and Zenith purchasing agent until June 30, 1969) definition of "basic and primary responsibility" as used in the Government's questions to him.

they could come up with any ideas or innovations. Maloney wanted to keep the design but lower the costs. (Tr. 368, 370, 429). Accurate invested a great deal of time in working with Zenith engineering in producing a model acceptable to the Zenith sales department. (Tr. 271-272, 282, 370, 430).

Numerous other Zenith suppliers were contacted in regard to the "circle of sound" model. These included MPI Industries, L. Burnham, a wholely owned Zenith subsidiary, Steiger Furniture Co., Igloo Cabinet Company and Modar Company. Each refused to bid on the model as designed by Zenith. (Tr. 377-379, 404, 83-84, 88-89).

In the course of the trial numerous Zenith employees were called to testify. These included Lloyd R. Nanfield, director of purchases; Peter J. Maloney, purchasing agent; Philip E. Teer, senior buyer; Edward T. Kirchner, Jr., buyer; William A. Seibert, senior buyer; Anthony Peter Cassa, field quality manager; Joseph Ferrari, value engineer; Leon Koza, cabinet engineer; Eugene Hoffer, value engineer. Each testified that Yonan never asked them to extend any favoritism or partiality to Greensphan or Accurate Box and that none had been extended. (Tr. 60, 87, 389, 294, 296, 314-316, 326-329, 365, 397, 405-406, 412-413). Maloney, Teer, Ferrari and Koza all testified that the prices charged Zenith by Accurate Box were fair and reasonable. (Tr. 388, 416, 297-306, 397, 405-406). In fact no witness in the entire trial stated that Yonan and/or Greensphan had sought or received any favoritism or partiality. No witness testified that the prices were other than fair and reasonable and competitive. As noted all the testimony was to the contrary.

The only evidence as to Zenith Purchase orders, Accurate bids or price per unit was brought out by the defendants. They established that Zenith usually allowed a supplier a profit of ten percent and that the bids submitted by Accurate Box included a profit margin of less than ten percent. (Greensphan Exhibit 1, 2, 1-A and 2-A; Tr. 76) [2] These bids and/or prices were not inflated in any way to include any payments to Yonan. (Greensphan Exhibit 1, 2, 8, 1-A and 2-A; Tr. 436-437, 465-467, 483-484). In fact the agreements to manufacture these cabinets (circle of sound) had been made long before any payments were made to A & G Woodworking or requested by Yonan. (Tr. 268-276, 367-372, 427-437, 446-458; Defendant Greensphan Exhibits 1, 2, 9, 7). In fact the future tenor of the Zenith-Accurate relationship was set forth in a letter from Greensphan to Maloney dated June 29, 1967 confirming their telephone conversation of that date, six months before any payments to A & G Woodworking. (Greensphan Exhibit 7).

On June 11, 1968 Hoffer a value engineer for Zenith did a value analysis on the "circle of sound cabinet" supplied by Accurate. The figure he arrived at was $28.93. (Defendant Greensphan Exhibit 8, Tr. 412-413). Later that month Zenith placed a purchase order for this cabinet dated June 24, 1968 for $28.38. (Defendant Greensphan Exhibit 9, Tr. 416-417). In addition Mr. John Cardis, purchasing agent in charge of Zenith, directed Philip E. Teer, a senior Zenith buyer, to prepare an analysis of all Accurate bids between 1966 and 1970. As a result of his review of all

[2] The profit was actually less than eight percent since Zenith required a rebate of two percent.

these bids and those of other manufacturers for similar items, Teer concluded that Accurate Box's bids to have been competitive. He also found the purchase orders to have been awarded on the basis of quality workmanship, performance and service. (Tr. 291). He reported these findings to Cardis in a memorandum dated January 21, 1971. (Defendant Greensphan Exhibit 4, Tr. 297-306). He did not know the purpose of this study at the time it was made. As the date indicates the study was made after Zenith was fully aware of the facts involving Yonan and Greensphan.

A. The Government Did Not Prove a Crime.

Courts have long recognized two types of fraud, actual and constructive, and the difference between them. *Shushan* v. *United States,* 117 F.2d 110, 115 (5th Cir., 1941); *Epstein* v. *United States,* 174 F.2d 754, 765 (6th Cir., 1949); *Post* v. *United States,* 407 F.2d 319, 329 (D.C. Cir., 1968) cert. den. 89 S.Ct. 863; *United States* v. *Lichota,* 351 F.2d 81 (6th Cir., 1965) cert. den. 382 U.S. 1027.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE GOVERNMENT PROVED KNOWLEDGE AND INTENT ON THE PART OF THE DEFENDANT GEORGE OF A SCHEME TO DEFRAUD ZENITH

For the purposes of this case, we may assume—whatever the original intent of the mail fraud statute—that the payment of a kickback to secure an actual advantage, or with the intent to do so, is encompassed by the fraud which the statute describes. *Shushan* v. *United States*, 5th Cir. 1941, 117 F.2d 110; *United States* v. *Proctor and Gamble Co.*, D.C. Mass. 1942; 47 F.Supp. 676; *United States* v. *Faser*, E.D. La. 1969, 303 F.Supp. 380. It may even be that the mail fraud statute embodies those schemes wherein an employee is corruptly influenced by the payment of a kickback to give less than his faithful services to his principal, especially where the less than faithful services involve the showing of favoritism to the kickback payer. See *United States* v. *Dorfman*, S.D.N.Y. 1971, 335 F.Supp. 675, 679; *United States* v. *Faser*, E.D. La. 1969, 303 F. Supp. 380, 383.

But in this case—even assuming the lack of the threat to Greensphan—the kickback payment was not tied to any advantage, actual or intended. Moreover such a theory was never advanced or suggested by the Government. Instead the Government argued that the payments here amounted to fraud because, *ipso facto*, they deprived Zenith of Yonan's faithful services and they enabled Yonan to earn "a secret profit."

The theory that the payment of money to the agent of another corrupts the agent and dilutes, in some unexplained manner, his loyalty to his employer is classically expressed as a constructive fraud. Similarly, the receipt of commissions by an employee because of his relationship with his employer, but not at the expense, or to the detriment, of his employer, has also been condemned as a constructive fraud. See *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754, 763-6; *Shushan* v. *United States*, 5th Cir. 1941, 117 F.2d 110, 115.

Apparently because of their recognition that the mail fraud statute does not reach these constructive frauds (*Epstein* v. *United States*, 6 Cir. 1949, 174 F.2d 754; *Shushan* v. *United States*, 5th Cir. 1941, 117 F.2d 110) the prosecution and the Court below hypothesized that Zenith was actually defrauded by the amounts paid A & G/Yonan, because Accurate "could have" reduced its prices to Zenith by those amounts. (Tr. 245, 250) This reasoning, however, ignores the uncontradicted evidence in this case.

It was unequivocally established that Zenith normally permitted its suppliers to earn a 10% profit on goods manufactured for Zenith, and that, in this case, Zenith contracted with Accurate knowing Accurate would be earning that 10% profit.[3] (Tr. 76; Greensphan Exhibit 1) Moreover, these contractual arrangements were established prior to Greensphan's agreeing to pay Yonan any kickbacks; and the same contractual arrangements prevailed after the agreement to pay the kickbacks. (Compare Greensphan Exhibit 1 with Greensphan Exhibit 2.) Thus, the

[3] Actually, Accurate earned less than a 10% profit because, as the purchase orders (Greensphan Exhibits 1 and 2) clearly showed, of a 2% "rebate" allowed Zenith.

argument that Zenith was entitled to a reduction in its price by the amounts which Greensphan paid A & G/Yonan is tantamount to an argument that Zenith would have been entitled to any portion of Greensphan's profit which he spent or wasted foolishly.[4]

The distinction which should be evident from the facts of this case is simply that the monies which Yonan received were not generated at Zenith's expense. Cf. *Post* v. *United States*, D.C. Cir. 1968, 407 F.2d 319, 329; *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754, 766-7. Thus Yonan's receipt of this money can be said to be repugnant to Zenith only from an ethical point of view. Zenith may have discontinued the transactions which generated these commissions had they known about them, but only because Zenith would have objected to the propriety of the situation. Certainly Zenith could not have found room to complain about the fairness of its contracts with Accurate, or about the fact that there had been an overreaching because of the relationship. Compare, *United*

[4] During argument on the defendant's motion for judgment of acquittal at the conclusion of the government's evidence, the prosecutor, when asked by the District Judge his view of *Epstein's* applicability to the instant case, argued that the Robinson-Patman Act (15 U.S.C. 13 (c)) prescribes the payment of commissions by a seller to the purchaser's agent. Whatever the effect of the Robinson-Patman Act on facts such as here, it is clear that the Act does not establish standards for criminal prosecutions, nor does it create an active fraud out of otherwise constructive frauds. If the employer is entitled to monies received by an employee during the course of and in apparent derogation of his employment, it is only because of such Acts or the equitable principles underlying creation of constructive trusts. It is certainly not because the employer has suffered any actual detriment as a consequence of the employee's receipt of commissions.

States v. *Groves*, 2nd Cir. 1941, 122 F.2d 87; *United States* v. *Buckner*, 2nd Cir. 1940, 108 F.2d 921, with *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754. Thus Zenith's asserted potential desire to reduce its prices by the amounts paid Yonan stands on no greater footing than a desire to obtain goods at the lowest possible price—even if it means that the manufacturer is earning no profit: the cheaper the price, the happier Zenith would have been; but Zenith's happiness is not the aim of the mail fraud statute.

The argument that the payment of commissions to Yonan deprived Zenith of the honest and faithful performance of his duties deserves scant attention. Again, we emphasize the Government's failure to show that Greensphan sought or that Yonan obtained or attempted to obtain any advantage for Greensphan, whether in derogation of Zenith's interests or not. That Zenith was deprived of the faithful performance of Yonan's duties merely because he received money from Greensphan, without more, is a fiction created by principles of equity which are inappropriate to be fastened onto the criminal law.[5] The germ of the concept may have emanated from *United States* v. *Proctor and Gamble Co.*, D.C. Mass. 1942, 47 F.Supp. 676, where the District Judge, in ruling upon the defendants' demurrers to an indictment charging mail fraud by reason of bribes to employees who thereafter obtained and turned over to the defendants their employer's business secrets, said:

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[5] We have complained in Point 2, *infra*, that the trial judge erred in instructing the jury that "to knowingly tamper or interfere with an employer-employee relationship for the purpose of and with the intent of depriving the employer of the employee's honest and faithful performance of his duties for the employer, may constitute a fraud within the meaning of the mail fraud statute." (Tr. 680)

> "When one tampers with that relationship [of employer and employee] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right. The actual deception is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests." (47 F.Supp. at 678)

The importance however of the phrase "for the purpose of causing the employee to breach his duty" is developed by the next succeeding sentence in Judge Sweeney's opinion:

> "The employee, in using the employment relationship for the express purpose of carrying out a scheme to obtain his employer's confidential information and other property, as alleged in the indictment, would be guilty of deliberately producing a false impression of his employer in order to cheat him. Such conduct would constitute a positive fraud * * *". (47 F. Supp. at 678)

The Record in this case is completely devoid of evidence of such a purpose underlying the payments of Yonan.

The insufficiency, and indeed confusion, of the government's case is further illustrated by its position as to the defendant Greensphan's testimony. Greensphan testified in his own defense that in October, 1967 Yonan demanded $1.00 per cabinet on the "circle of sound". As to why he agreed to pay these monies he stated "(B)ecause I was afraid that I was going to lose the business." (Tr. 458). Up to this point there had been no explanation as to why the alleged payments to Yonan were being made.[6] In its

[6] Calvin Kahn testified only that the Accurate checks to A & G Woodworking were commissions on sales to Zenith.

argument the government used this explanation for the payments but argued it was not extortion.[7] In doing so, it stated that Greensphan was buying Yonan's services and establishing an employer-employee relationship. (Tr. 659, 662, 664-665). What services? There was no evidence of any services performed by Yonan for Greensphan. Nor was there any evidence that Greensphan was purchasing any services. In fact the evidence was exactly the opposite. This gross misstatement of the evidence was not only prejudicial, but is indicative of the inherent weakness of the government's case. *This inconsistency was heightened when at sentencing the government characterized the defandant Greensphan's testimony concerning the conversation in October, 1967 as ". . . the substantial truth. . ."*

But what of George's participation and any evidence of *his* specific intent to defraud Zenith, a necessary element of the crime charged. *United States* v. *Rabinowitz,* 327 F.2d 62, 77 (6th Cir., 1964). Within the theory of the government's case, George was allegedly the conduit for payments by Greensphan to Yonan. In its argument to the jury George's participation was characterized by the government as follows:

> "Let's move on to the defendant George; the defendant George helped to make this scheme work. He made the false representations pay. He made—he provided the conduit for the money. He was the intermediary to cover the tracks of Mr. Yonan and Mr. Green.

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[7] Extortion of course would have been a complete defense to the charge of this indictment, not only to Greensphan, but also to the defendant George. See: D.G.Br. p. 28-30.

> A & G Woodworking, if you look at the books and records of Mr. Green's corporation, he has the checks payable to A & G Woodworking. Who is A & G Woodworking?
>
> And then after the money gets in to A & G Woodworking Mr. George forwards, some of it at least at this particular time; how much was provided we don't know. The evidence supports at least $100,000 in checks. He was Yonan's bag man.
>
> Andrew George didn't do anything for the money he received. Nothing legitimate, that is.
>
> Then there is Mr. Green's additional testimony about $3,000 in cash he paid to George personally at the currency exchange on Rush Street." (Tr. .....)

The opinion, recognizing the essential element of intent to defraud Zenith states:

> "He (George) must have known Yonan's position at Zenith and the relationship between Yonan and Greensphan." (O.P.9).

This is, of course, an inference as the language would imply. There is no direct evidence that George knew of Yonan's employment at Zenith or his relationship to Greensphan or of Zenith's "conflict of interest" policy. The opinion then goes on to draw the additional inference that George, knowing those facts,:

> ". . . must have known that some actual injury to Zenith was the reasonably probable result of this scheme." (O.P. 9-10).

Thus the opinion has allowed George's guilt to rest upon an inference based on an inference. It is axiomatic that an inference may not be based on an inference, but must

be based on a fact directly proven. *United States* v. *Russo*, 123 F.2d 420 (3rd Cir., 1941). In this case that is exactly what has occurred.

The opinion, in attempting to bolster this alleged connection between George's payments to Yonan and Greensphan's commissions from Zenith states:

> "That George's payments to Yonan had their source in Greensphan's commission payments to George is shown by Yonan's call to Greensphan's accountant asking about the commission sums paid to George by Greensphan and by Yonan's checking the shipping quantities on an A & G invoice with Greensphan's plant superintendent." (O.P. 9).

Thus George is being made accountable for Yonan's acts which were completely unknown to him. In fact there is no proof whatsoever to connect George's payments to Yonan with Greensphan's commissions from Zenith. Thus in order to connect George to the alleged scheme or joint venture the opinion has used Yonan's acts and statements. It is well settled that an individual may only be shown to be part of a joint venture by his own acts and statements. It is only after having been shown to be a member of such an enterprise that the acts and statements of his coventurers may be used against him. The necessity of the Court's wrongful attempt to connect George to the scheme is itself illustrative of the insufficiency of the government's case.

If in fact this was a scheme designed to defraud Zenith and George was merely a conduit, why did George keep two-thirds (2/3) of the monies? Can this Court ignore and thereby allow the jury to ignore the obvious, namely that bagmen and/or conduits do not keep two-thirds (2/3) of an illicit gain. Furthermore it was uncontested that George fully reported these monies on his respective income tax returns (Tr. 713).

Counsel for defendant George is reminded that at oral argument the question was asked whether in either case George was a "bad man". The charge is mail fraud and no other. The government is required to prove that charge beyond a reasonable doubt.[8] This requires proof of George's specific intent to defraud Zenith, not equivocal proof establishing that George *might* have obtained something for nothing.

The defendant recognizes that this Court in considering arguments addressed to the sufficiency of the evidence must take the evidence in the light most favorable to the government. However, this general rule of appellate review does not mean that the Court may ignore the evidence as whole. In this case the government's evidence, at best, strained in attempting to establish George's guilt. In no way can it be said to have been sufficient beyond a reasonable doubt. That the jury found him guilty is easily understood in light of the fact that the trial court, and now this Court, refused to give a theory of defense instruction, allowed the jury to consider the Zenith "conflict of interest" policy of which he had no knowledge, allowed the jury to make inferences on inferences, and in allowing the jury to consider the acts and statements of his co-defendants against him when there had been no showing he was a member of a joint venture or knew of its objectives.

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[8] The defendants George and Yonan were defended in the trial by the same counsel, not George's present counsel, and it is obvious from a review of both the government's and the defendant's arguments that the evidence and lack of evidence as to George was ignored. Although no argument could have been made as to effective assistance of counsel it is obvious that the strategy at trial benefited Yonan rather than George. In making this observation George refers the Court to the colloquy between George and the court at the time of sentencing (Tr. 699-731).

II.

WHETHER THE COURT PROPERLY REFUSED THE THEORY OF DEFENSE INSTRUCTIONS

The question of whether a defendant in a criminal case is entitled to an instruction reflecting his theory of defense is not new. It is axiomatic that he is, yet the government persists in objecting to such instructions, the trial courts continue to refuse them and reviewing courts continue to say they must be given. *United States* v. *Vole*, 435 F.2d 774, 776 (7th Cir., 1970); *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7th Cir., 1970); *United States* v. *Phillips*, 217 F.2d 435 (7th Cir., 1954); *United States* v. *Bessesen*, 445 F.2d 463 (7th Cir., 1971); *United States* v. *Megna*, 450 F.2d 511 (5th Cir., 1971).

The evidence in this record which supports the requested instructions is substantial. Greensphan's uncontradicted testimony detailing the threats to his business made by Yonan (Tr. 447-53), and the resultant fears which motivated the payments (Tr. 452, 458), were corroborated by denials by eight witnesses of knowledge of any favoritism shown him by Yonan or Zenith as a result of the payments. The payments were demanded and agreed upon at least eight months after Greensphan had bid on and received the Circle of Sound contract. The Government introduced no evidence which tended to show any advantage gained by Greensphan as a result of the payments. In fact at sentencing the government characterized the defendant Greensphan's testimony concerning the conversation with Yonan in October 1967 as ". . . the substantial truth". (Tr. 723)

Greensphan submitted two "theory of defense" instructions.[9] The government objected to B without stating any reason or authority. The court sustained the objection stating it is "a good argument for the jury" (Tr. 556). As to C the government merely stated, "it is, again, a matter of argument".[10] The court said, "(W)ell, this is, again,

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[9] Greensphan's tendered instruction B read:

"The defendant has offered evidence that he paid sums of money to Mr. Yonan as a result of his fear that Mr. Yonan would wrongfully deprive him of business to which he was rightfully entitled, and that these payments of money were not made with the intention or to defraud the Zenith Radio Corporation or its subsidiaries. In determining whether the defendant acted as a result of his fear that Mr. Yonan would wrongfully deprive him of business to which he was rightfully entitled, or with an intent to defraud the Zenith Radio Corporation and its subsidiaries, the jury should consider all the facts and circumstances in the case. If the jury finds that the defendant acted upon the fear that he would be wrongfully deprived of business to which he was rightfully entitled, he should be found not guilty." (R. 55)

[10] His tendered instruction C read:

"It is the defendant Greensphan's theory of the case that the payments which he made to Peter Yonan were induced by the fear that Mr. Yonan would wrongfully take from him contracts to construct cabinets for the Zenith Radio Corporation and its subsidiaries to which he was rightfully entitled.

"Further, it is the defendant Greensphan's theory of the case that the payments which he made to Mr. Yonan were not intended to defraud the Zenith Radio Corporation or its subsidiaries by inducing Peter Yonan to award contracts to Mr. Greensphan which the Zenith Radio Corporation would not otherwise have awarded to Mr. Greensphan.

"Further, it is the defendant's theory of the case that the payments which were made to Mr. Yonan were not intended to defraud the Zenith Radio Corporation or its subsidiaries by inducing Peter Yonan to show favoritism or partiality to the defendant Greensphan." (R. 55)

a restatement of your argument" (Tr. 557). This Court disposed of defendants' arguments concerning the refusal of this instruction in the following manner:

> "Greensphan's 'theory of defense', to the extent it was valid and supported by evidence was adequately safeguarded because the instructions given as to intent, 'knowingly' and 'willfully' as used in the two statutes specified in the indictment permitted the jury to accept the hypothesis that Yonan's economic pressure negatived Greensphan's intent to harm Zenith. Its choice not to do so was supported on this record."[11] (O.P. 10).

In *United States* v. *Phillips*, 217 F.2d 435, 443 (7th Cir., 1954) this Court quoted an earlier D.C. Circuit opinion and stated:

> ". . . in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, *even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.*"

This maxim has been reaffirmed and quoted continuously since. *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7th Cir., 1969); *United States* v. *Vole*, 435 F.2d 774, 776 (7th Cir., 1970); *United States* v. *Bessesen*, 445 F.2d 463, 467 (7th Cir., 1971). Contrary to these precedents this opinion makes a feeble attempt to discount and explain away the evidence[12] and then concludes that the instructions as to

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[11] The government acknowledged the truth of Greensphan's testimony and his lack of an alternative, when faced with Yonan's demands (Tr. 723).

[12] Evidence which the government characterized as the "substantial truth". (Tr. 734).

intent, knowingly and willfully adequately ". . . permitted the jury to accept the hypothesis that Yonan's economic pressure negatived Greensphan's intent to harm Zenith". Thus the opinion ignores the thrust of the above authorities and focuses instead on whether the instructions as a whole permitted the jury to accept defendants' theory. In other words, as long as the instructions do not affirmatively *preclude* his "theory of defense" no error exists. Such is not the law in this Circuit.

The error in refusing this instruction was especially important since the court gave instructions submitted by the government which summarized its theory of the case. This instruction encompassed the theory that it was unlawful to "tamper or interfere with an employer-employee relationship for the purpose of and . . . intent of depriving the employer of the employee's honest and faithful (services)". In a case which the trial court described as close the defendant George was severely prejudiced by the failure to give Greensphan's requested "theory of defense" instruction.

III.

WHETHER THE COURT ERRED IN ADMITTING EVIDENCE OF ZENITH CONFLICT OF INTEREST POLICY

The witnesses *Nanfield and Maloney* were questioned by the Government concerning Zenith's policy "with respect to employees of the Purchasing Department accepting gifts or things of value from a supplier". Each stated Zenith had a "conflict of interest policy" prohibiting such gifts. Nanfield testified this policy was made known to suppliers in letters sent to them annually and that from checking his files he knew Greensphan was addressed a

letter in 1970 and 1971. (Tr. 43-45). Nanfield and Maloney testified that all Zenith employees were required to acknowledge this policy in writing. (Tr. 43, 70-72). The witness Denton testified that Yonan's personnel file contained two such acknowledgments. (Tr. 174-176). All defendants objected to this evidence and the following colloquy then took place.

> "Mr. Lydon: I propose to show some knowledge on the part of Mr. Yonan and Mr. George—or Mr. Green, I should say.
>
> The Court: Well, on your representation that there will be some evidence—." (Tr. 41).

The Court admitted the testimony and subsequently the letters to the Zenith suppliers and employees, Government Exhibits 6 and 7 respectively. (Tr. 45-46, 176).

As noted by the Court's opinion this evidence was received as to the defendants Yonan and Greensphan since "the trial testimony went to connecting the policy with Yonan and Greensphan *only.*" However, the trial court gave a joint venture instruction allowing, as this Court's opinion also allows, the jury to use that evidence against George, ". . . if the jury found the existence of a joint venture and if in furtherance thereof".

This rather simple disposition of the issue ignores two important circumstances. One, the government offered this evidence *only* as to Greensphan and Yonan (Tr. 41). This is apparent when the government in offering the particular exhibit applicable to Yonan stated, "Your Honor, we are *only* offering it as to Defendant Yonan" (Tr. 174). There was no attempt by the government to enlarge its applicability of this particular evidence to George, yet the instruction wrongfully allowed the jury to do this.

Secondly, the Court precluded George from discussing the instruction generally and this evidence specifically with the jury. When attempting to discuss this instruction and the evidentiary implications, the following occurred:

> "I mention that because it will necessarily, in speaking of the evidence, to remind you, jurors, that evidence that Judge Decker may rule competent as to one defendant might be admissible to another. What I mean by this is, there is evidence in this case in which Judge Decker has ruled that it is admissible only to one defendant and that defendant is Irving Green.[13]
>
> The Court: Well—
>
> Mr. Lydon: Your Honor, I'm going to object.
>
> The Court: I told the jury, and let's make this very clear, I told them that, subject to the instructions that they will receive at the close of this case, and that was a tentative ruling only, and the jury will receive an instruction—and, counsel, you received a copy of it, that—
>
> Mr. Frank Whalen: Yes, your Honor.
>
> The Court: And, subject to that instruction, and it is going to be up to the jury to determine whether the evidence applies to all defendants or to only one defendant, and there is no ruling by the Court, the jury will make that determination on the basis of all of the evidence in the case, subject to the Court's instruction". (Tr. 612-613).

As noted, this evidence was offered only as to the defendants Yonan and Greensphan. No motion was ever made by the government to enlarge its application to the defendant George. Yet when counsel for George attempted to discuss with the jury this evidence in the context of the court's previous rulings and in anticipation of the

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[13] Green is Greensphan.

court's instruction, he was stopped. Considered in the light of the government's theory of the case, the above circumstances take on added importance. The government's theory was that the "only relevant defense fact they (the defendants) could have urged, however, was that Zenith knew and approved of their arrangement, a fact, as evidenced by this policy, not available to them." (G.Br. 32). What of George?

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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VILLANOVA

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

Nos. 72-1553, 72-1554, 72-1555

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANDREW GEORGE, IRVING GREENSPHAN and PETER K. YONAN,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois
Eastern Division.

No. 71 CR 795

BERNARD M. DECKER, *Judge.*

ARGUED FEBRUARY 12, 1973—DECIDED APRIL 12, 1973

Before CASTLE, *Senior Circuit Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* The three defendants were indicted for mail fraud in violation of 18 U.S.C. § 1341 and for aiding and abetting that fraud under 18 U.S.C. § 2. The indictment was ultimately in 18 counts.[1] The

[1] The original Count 18 was dismissed and Count 19 became Count 18 prior to submission of the case to the jury.

only variance in counts was that the last 17 involved additional mailing dates.

The indictment described defendant Peter K. Yonan as a cabinet buyer in the Purchasing Department of Zenith Radio Corporation. Defendant Andrew George was said to do business as A & G Woodworking Co. The other defendant, Irving H. Greensphan, was specified as president of Accurate Box Corporation, which supplied cabinets to Zenith.

The grand jury charged that from June 1967 through January 1971, the three friends devised a scheme to defraud Zenith whereby Yonan received kickbacks on Accurate Box Corporation's sales of cabinets to Zenith. To accomplish this, George allegedly submitted fictitious "commission" invoices of A & G Woodworking Co. to Greensphan's company. After these invoices were paid, George supposedly paid part of the proceeds to Yonan. The kickbacks were of course not disclosed to Zenith. The indictment alleged that the scheme deprived Zenith of its lawful money and property and of the honest and faithful performance of its employee Yonan's duties. The mailings mentioned in the indictment covered checks sent by Zenith to Greensphan's cabinet company before the latter was billed by George's company.

After a jury trial, the defendants were found guilty as charged. Yonan received a three-year sentence; George received a one-year sentence and was assessed a $1,000 fine on each count; and Greensphan received a six-month sentence and was ordered to pay a $1,000 fine on each count. On appeal, all defendants assert that the evidence was insufficient to convict them of mail fraud; George and

Greensphan assail instructions; George complains of the court's receipt into evidence of Zenith's conflict-of-interest policy; and Yonan attacks the court's refusal to sever his trial from Greensphan's. We affirm.

The evidence brought forward at the trial disclosed a novel scheme. Yonan went to work for Zenith in 1961 and was a buyer in the cabinet division of Zenith's Purchasing Department. He had "primary responsibility" for negotiating with cabinet vendors, and, in the words of his immediate supervisor, that meant "his responsibility was to send out the blueprints and gather in quotations, and where the price was too high, to try to negotiate it down to a proper level." Of course, the quotations Yonan negotiated were reviewed by his superiors and by other departments of Zenith. In 1966, Yonan was given the responsibility for finding and negotiating with a supplier of cabinets for Zenith's newly conceived "Circle of Sound" product. His responsibility also included arranging for delivery and monitoring the quality of the cabinets. His friend since the mid-fifties, defendant Greensphan, the owner of the Accurate Box Corporation ("Accurate"), was tapped as the supplier. During the indictment years, Accurate was the sole bidder on and supplier of these cabinets. Yonan's supervisor thought Accurate's prices to be fair and reasonable, but in the absence of other bidders, could not conclude they were competitive. Zenith normally allowed its suppliers a maximum of 10% profit, and Accurate's prices reflected that profit margin. The Circle of Sound product proved to be a tremendous financial success. The Zenith checks listed in the indictment were received by Accurate in payment of the cabinets sold to Zenith.

Without recounting any actual threat by Yonan, Greensphan testified that he agreed to pay Yonan $1 per cabinet kickback on the model 565 Circle of Sound unit and later per cabinet kickbacks on other models because he was afraid he was otherwise going to lose Zenith's business. Yonan assertedly told him that "everybody and their uncle would like to get into this to manufacture this unit." He stated that Yonan's requests for such payments originated in October 1967. When he asked Yonan how the kickbacks were to be paid, Greensphan was told to pay A & G Woodworking Co.'s commission invoices. Greensphan never related these events to anyone at Zenith. He had known defendant George since 1960. He denied inflating any quotations to cover monies paid to Yonan.

Commencing in December 1967, Accurate received commission invoices from defendant George's A & G Woodworking Co. even though neither George nor A & G Woodworking Co. provided any services to Accurate. Accurate paid these invoices on the basis of a commission per unit on the types of models it shipped to Zenith.[2] Greensphan also cashed a $3,000 Accurate check payable to himself and gave the proceeds to George because he was fearful of losing Zenith's business. To conceal the set fee per unit commission on the cabinets shipped, Accurate's records showed the payments to George's company as 3.4% on monies Accurate received from Zenith rather than as fixed sums on each cabinet. However, on these records the total prices of the cabinets shipped to Zenith were not correct, but

[2] On two Circle of Sound models, the commission was $1.00 per unit shipped, and on two others it was $.75 and $.20 per unit respectively.

were altered to make the commissions correspond to 3.4% thereof. From December 1967 until December 1970, Accurate paid George's company in excess of $300,000 in commissions. During the period in which Greensphan's company was paying the commission invoices of George's company, the latter paid Yonan kickbacks in excess of $100,000 through checks made out by George.

The Government's theory, credited by the jury, was that the kickbacks to Yonan were accomplished by Greensphan's payments of George's company's fictitious commission invoices, with George then acting as a kickback conduit to Yonan. In this connection, it should be noted that in 1969 or 1970, Yonan asked Greensphan's company's controller for a report of the total commission payments then made by that company to George. Shipping quantities on at least one A & G invoice were confirmed to Yonan by Accurate's plant superintendent.

Zenith had a conflict-of-interest policy providing that no gratuities of any nature were to be bestowed on its Purchasing Department employees by suppliers. Yonan twice signed documents embodying that policy, which was annually brought to the attention of all suppliers of Zenith through letters sent out to them. Greensphan admitted receiving these letters during the period of time he was channeling the payments to Yonan.

A number of Zenith's employees testified that Yonan did not request preferential treatment for Greensphan and his company and that they had no knowledge of Yonan providing such treatment for them. It appears Yonan was insistent on quality and efficiency from Accurate.

Evidentiary Sufficiency of a Scheme to Defraud

The mail fraud statute[3] delineates two essential elements constituting the crime: a scheme to defraud and use of the mails in furtherance of the scheme. There is no dispute as to the sufficiency of the evidence to establish use of the mails, nor could there be. Defendants contend that the evidence was insufficient to satisfy the first element—the existence of a scheme to defraud. Reduced to its essential distillation, their argument is that because the kickbacks were never shown to come out of Zenith's pockets, as opposed to Greensphan's, because Yonan was never shown to provide or secure any special services for Greensphan and his company, and because Zenith was never shown to be dissatisfied with Accurate's cabinets or prices, no fraud within the contemplation of the statute can have occurred. We reject this argument, in part because it misses the point in two respects and in part because the particular scheme shown by the evidence to defraud Zenith is, from every defendant's point of view, within the reach of the mail fraud statute.

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[3] 18 U.S.C.A. § 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Since the gravamen of the offense is a "scheme to defraud," it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss. *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1180-1181 (2d Cir. 1970); *Pritchard* v. *United States*, 386 F.2d 760, 766 (8th Cir. 1967); *Adjmi* v. *United States*, 346 F.2d 654, 657 (5th Cir. 1965); *United States* v. *Shavin*, 287 F.2d 647, 651-652 (7th Cir. 1961), certiorari denied, 375 U.S. 944. If there was intent on the part of a schemer to deprive Zenith of Yonan's honest and loyal services in the form of his giving Greensphan preferential treatment, it is simply beside the point that Yonan may not have had to (or had occasion to) exert special influence in favor of Greensphan or that Zenith was satisfied with Accurate's product and prices. And it is of no moment whether or not the kickback money actually came from Zenith. *United States* v. *Dorfman*, 335 F. Supp. 675, 679 (S.D.N.Y. 1971). Thus the district court correctly charged the jury that it was unnecessary for the Government to prove "that anyone actually be defrauded." Contrary to defendants' contentions, the evidence hardly shows that it was impossible for Yonan to exercise favoritism toward Greensphan. As the Court noted in *Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir. 1941), certiorari denied, 313 U.S. 574: "The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view." In our view the evidence shows that Yonan did have opportunities to give Greensphan preferential treatment, particularly by avoiding the solicitation of potential competitors. Of course, the actual exercise of any such opportunity by a person in Yonan's position may be practically undetectable.

Furthermore, even if Yonan never intended to give Greensphan preferential treatment, and the Government does not argue that the evidence was sufficient to support a conclusion that he did, the defendants' argument still misses the mark. The evidence shows Yonan actually defrauded Zenith. We need not accept the Government's far-ranging argument that anytime an agent secretly profits from his agency he has committed criminal fraud.[4] Not every breach of every fiduciary duty works a criminal fraud.[5] But here Yonan's duty was to negotiate the best

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[4] See *United States* v. *Fasen*, 303 F. Supp. 380, 383-384 (E.D. La. 1969); *United States* v. *Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla. 1962).

[5] See *Epstein* v. *United States*, 174 F.2d 754 (6th Cir. 1949). In that case, heavily relied on by defendants, two of the defendants had directorates in both breweries and brewery supply companies, and the Government argued that because the breweries bought from these suppliers and the defendants did not disclose their conflict-of-interest positions, the defendants were guilty of mail fraud. The Court held such conduct was "constructive" and not "active" fraud and outside the purview of the mail fraud statute absent a showing that the supply companies' prices were unfair. Its rationale was that under applicable civil law, directors, on behalf of their corporations, could contract with themselves or corporations in which they were interested, and such contracts were completely valid so long as they were advantageous and made in good faith. Under these circumstances mere non-disclosure did not generate a profit at the corporation's expense. However, those defendants did not have a duty to make their profit—the return on their investment in the supply companies—available to the breweries, whereas Yonan did have a duty to make his profit—an assumedly unmerited kickback—available to Zenith. There was no reason to believe disclosure by the defendants in *Epstein* would have, under the particular circumstances there, made any bargaining difference to the breweries, but Yonan's disclosure, in addition to making the scheme impossible, would have enabled Zenith to realize a substantial discount.

price possible for Zenith or at least to apprise Zenith that Greensphan was willing to sell his cabinets for substantially less money. Not only did Yonan secretly earn a profit from his agency, but also he deprived Zenith of material knowledge that Greensphan would accept less profit. There was a very real and tangible harm to Zenith in losing the discount or losing the opportunity to bargain with a most relevant fact before it. As Judge Learned Hand stated in a related context:

> "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed." *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir. 1932), certiorari denied, 286 U.S. 554.

Here the fraud consisted in Yonan's holding himself out to be a loyal employee, acting in Zenith's best interests, but actually not giving his honest and faithful services to Zenith's real detriment.

No refuge can be taken in Zenith's policy "normally" to allow suppliers a 10% profit and in Accurate's prices being within that margin. Nothing would have prevented Zenith from bargaining with Accurate for a lesser profit margin, and it would be unrealistic to presume that Zenith would consider the fact of better than $100,000 in actual kickbacks to its buyers—over $300,000 in agreed-to-kickbacks—to be immaterial in its dealings with Greensphan. It is preposterous to claim that Zenith would have spurned such a discount if offered.

In this case, whether Zenith was to be deprived of Yonan's honest and faithful performance of his duties to the extent of his secretly profiting from his agency and concealing knowledge of the availability of that material sum from Zenith, or to the further extent of his meriting the payments which he received, a fraud within the reach of the mail fraud statute would be present.[6] The statute requires the existence of a scheme to perpetrate this fraud, and the question of evidentiary sufficiency boils down to whether the Government has proven that the defendants contemplated that Zenith suffer the loss of Yonan's honest and loyal services.

Indubitably the evidence showed a "scheme." The critical element is fraudulent intent. *United States* v. *Regent Office Supply Co., supra* at 1180. Each of the defendants asserts that there was insufficient evidence as to his intent to defraud Zenith of Yonan's loyalty and honesty, but we conclude to the contrary.

As to Yonan, his undisclosed receipt of the kickbacks by itself warrants a finding that he intended to defraud Zenith of his honest and loyal services. His employment duty was to negotiate the best possible deal for Zenith, or at least to apprise Zenith that Greensphan would be satisfied with a lesser profit margin. He is presumed to know that he could not personally profit by any de-

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[6] The court properly charged the jury as follows:

"Now, to knowingly tamper or interfere with an employer-employee relationship for the purpose of and with the intent of depriving the employer of the employee's honest and faithful performance of his duties for the employer may constitute a fraud within the meaning of the mail fraud statute." *See United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942).

crease in price he could negotiate with Greensphan[7] and that any such decrease should be made available to Zenith. In sum, the jury could hardly help but infer that Yonan intended to do exactly what he did. Hence it was not necessary for the jury to conclude that when Yonan received the kickbacks, he intended to defraud Zenith further by giving Greensphan the favored treatment for which Yonan was paid.

The evidence also supports a finding that George contemplated Zenith would be defrauded of Yonan's honest and faithful services. George billed Greensphan for "commissions" on the Circle of Sound cabinets Greensphan sold Zenith though he provided no services to Greensphan. Checks totalling about $100,000, approximately one-third of the commissions, then passed from George to Yonan, with George apparently retaining an unmerited two-thirds. That George's payments to Yonan had their source in Greensphan's commission payments to George is shown by Yonan's call to Greensphan's accountant asking about the commission sums paid to George by Greensphan and by Yonan's checking the shipping quantities on an A & G invoice with Greensphan's plant superintendent. George can hardly claim to have been an unwitting conduit for the payments from Greensphan to Yonan. He submitted spurious invoices based on the number of cabinets Greensphan shipped to Zenith and made an enormous profit in the process. He, Greensphan, and Yonan were mutual friends at the inception of the scheme, and, at least on one occasion, were observed together in Accurate's plant.

[7] Lest there be any doubt on that score, it may be noted that Yonan twice signed Zenith's conflict-of-interest policy, thus acknowledging this.

He must have known Yonan's position at Zenith and the relationship between Yonan and Greensphan. If the substantial payments from Greensphan to Yonan were not designed to compromise Yonan's fiduciary duties to Zenith, why were they not made directly and openly instead of through George and disguised as commission payments to him? Why would the transaction be so shrouded in secrecy and spuriousness if Yonan could legitimately make and hide from Zenith an enormous profit from his employment position or curry Greensphan's favor? It would take a man of incredible naiveté to play George's role in this scheme and not understand that Yonan was giving less than full measure of loyalty and honesty to Zenith. At least he must have known that some actual injury to Zenith was the reasonably probable result of this scheme. See *United States* v. *Regent Office Supply Co., supra* at 1182.

Having admitted that he agreed to make the kickback payments to Yonan to ensure that he would not lose the Circle of Sound cabinet business, Greensphan argues that he lacked the requisite intent on the ground that he was the victim of extortion. He urges what is really an affirmative defense of extortion. However, he had no contractual agreements entitling him monopolistically to continue to sell cabinets to Zenith. He had no right to be protected from future competition. If he really feared Yonan would wrongfully try to shift the cabinet business to a competitor, why did Greensphan not go to Zenith with the report that Yonan had asked for the kickbacks? He presented nothing to indicate why this course was not open to him. And certainly he could have gone to Zenith when and if Yonan had decided that a less deserv-

ing competitor should get the business. Under some circumstances a threat of economic injury may constitute a defense, but not here. Furthermore, since, by Greensphan's own account, Yonan did not actually threaten him with economic harm, the evidence does not support his claim. *United States* v. *Miller*, 340 F.2d 421, 425 (4th Cir. 1965). Accordingly, his tendered instructions B and C were properly refused. Under the evidence Greensphan's payments could be considered by the jury as an attempt to obtain an advantage against competition by purchasing Yonan's loyalty. Greensphan's "theory of defense," to the extent it was valid and supported by evidence, was adequately safeguarded because the instructions given as to intent, "knowingly" and "willfully" as used in the two statutes specified in the indictment permitted the jury to accept the hypothesis that Yonan's economic pressure negatived Greensphan's intent to harm Zenith. Its choice not to do so was supported on this record.

Thus we conclude that there was sufficient evidence for the jury to find that each defendant intended to defraud Zenith.

Admissibility of Zenith's Conflict-of-Interest Policy

The Government introduced Zenith's conflict-of-interest policy as bearing on the knowledge of Yonan and Greensphan. It was clearly admissible for this purpose since Yonan's and Greensphan's knowledge of that policy bore on their intent to defraud, though it was not essential for proving that intent. The record does not show that Zenith's conflict of interest policy was admitted with reference to George's intent. The trial testimony went to connecting the policy with Yonan and Greensphan only.

The jury was correctly instructed that admissions, acts or statements of other *defendants* in the scheme were attributable to all only if the jury found the existence of a joint venture and if in furtherance thereof. No error was committed with respect to receiving in evidence Zenith's conflict-of-interest policy for the limited purpose for which it was offered.

Refusal to Sever Yonan from Greensphan's Trial

Yonan claims that Greensphan's defense was antagonistic, thus entitling Yonan to a mistrial and a separate trial. Here we fail to discern any conflict of defense strategies, much less one so irreconcilable "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *United States* v. *Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). True, Greensphan testified that Yonan asked him for kickbacks, but Yonan's only real defense to what the Government proved he did was that his conduct could not have defrauded Zenith. This defense would not be undercut because he asked Greensphan for kickbacks, and Greensphan presented the same defense.

Yonan's real complaint is that Greensphan, in an attempt to save himself, made Yonan out to be a blackmailer, and the jurors "could well conceive it their duty to remove such a person from society." But "the mere fact that * * * one may try to save himself at the expense of another is in itself alone not sufficient grounds to require separate trials * * *" *United States* v. *Hutul*, 416 F.2d 607, 620 (7th Cir. 1969), certiorari denied, 396 U.S. 1007. And Greensphan did not save himself. Furthermore, under the instructions given, the jury could not have convicted Yonan of extortion, and we see no substantial prej-

udice to warrant upsetting the presumption that the jurors followed the law as given to them. In sum, having found no clear likelihood of detriment to Yonan's defense or confusion in the jury's mind so great as to prejudice his fair trial, we find the trial judge did not abuse his discretion by trying all participants in the scheme together. *United States* v. ***Kahn,*** 381 F.2d 824, 838-839 (7th Cir. 1967), certiorari denied, 389 U.S. 1015.

Judgments affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 31, 1973.

Before

Honorable LATHAM CASTLE, *Senior Circuit Judge*
Honorable THOMAS E. FAIRCHILD, *Circuit Judge*
Honorable WALTER J. CUMMINGS, *Circuit Judge*

No. 72-1553

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANDREW GEORGE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 CR 795

BERNARD M. DECKER, *Judge.*

ORDER

On consideration of the petition of the appellant, Andrew George, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-39

ANDREW GEORGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented involve the sufficiency of the evidence, the refusal of the trial judge to give an instruction proffered by a codefendant regarding economic coercion as a defense to mail fraud, and the effect on petitioner of evidence admitted solely against his codefendants.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on eighteen counts charging mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to imprisonment for one year and was fined $1,000 on each count.[1] The court of appeals affirmed (Pet. App. A; 477 F. 2d 508). A petition for rehearing was denied on May 31, 1973 (Pet. App. B). The petition for a writ of certiorari, filed on July 2,

[1] Codefendants Irving Greensphan and Peter K. Yonan were convicted jointly with petitioner. They have filed separate petitions for a writ of certiorari (Nos. 72-1610 [Greensphan] and 73-61 [Yonan]).

1973, is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no claim warranting further review

The pertinent evidence is set forth in the opinion of the court of appeals. It shows that codefendant Peter Yonan was hired by the Zenith Radio Corporation in 1961 as a buyer of cabinets. When, in 1966, Zenith devised plans for a new cabinet known as the "Circle of Sound," Yonan had the responsibility of finding a supplier and negotiating the price for furnishing the new cabinets. The supplier chosen was the Accurate Box Corporation, owned by co-defendant Irving Greensphan, a friend of Yonan and the only bidder on the Zenith contract. From 1966 to 1970 Accurate Box continued to be the sole bidder on this lucrative contract. Zenith believed that Accurate Box's price was reasonable; the profit margin to Accurate Box was within the 10% limit Zenith usually allowed suppliers.

Late in 1967 Yonan made certain comments to Greensphan which led the latter to believe that unless he furnished Yonan with a kickback, he might lose the Zenith business. Although both were aware of Zenith's written policy providing that suppliers were not to give gratuities to purchasing department employees, Greensphan agreed to pay Yonan kickbacks disguised as payments to A & G Woodworking Company, which was owned by petitioner, a mutual friend. Beginning in December 1967, Accurate Box received fictitious invoices for "commissions" from A & G Woodworking Company and paid out more than $300,000 in this manner, two-thirds of which petitioner kept and one-third of which he paid to Yonan.

1. In advancing his allegation of insufficiency of the evidence, petitioner argues initially that an essential element of the offense, financial loss to Zenith, was not proved. In addition, petitioner contends that there was no

evidence of his knowledge or intent to defraud. The claim relating to Zenith's financial loss has been discussed in our memorandum opposing codefendant Greensphan's petition for a writ of certiorari (No. 72-1610).[2] There we pointed to the opinion of the court of appeals, which correctly noted that the government was not required to prove that the victim of a scheme to defraud suffered an actual loss. We also argued that in any event, Zenith was in fact defrauded by Yonan's failure to bargain competitively on behalf of his employer to obtain the most favorable terms available to Zenith for the cabinet contract. As a result, Zenith's payments exceeded by more than $300,000 the price the seller in fact required. See *New England Enterprises, Inc.* v. *United States*, 400 F. 2d 58 (C.A. 1), certiorari denied, 393 U.S. 1036; *United States* v. *Rowe*, 56 F. 2d 747, 749 (C.A. 2), certiorari denied, 286 U.S. 554.

Petitioner's knowledge and intent were established by proof that he and Yonan were personal friends; that after Yonan and Greensphan had discussed kickbacks, petitioner submitted his own company's invoices to Greensphan for "commissions" on the cabinets which Greensphan had sold to Zenith; that the false invoices were based on the number of cabinets shipped by Greensphan to Zenith; that petitioner's company manifestly had done no work warranting receipt of commissions on the cabinets; that he received more than $300,000 from Greensphan in response to the frequent mailing of invoices; and that he retained two-thirds of this substantial amount and passed along more than $100,000 by check to Yonan. The question of petitioner's knowledge and intent was submitted to the jury under appropriate instructions; the jury's conclusion that petitioner was more than an "unwitting

[2] We are providing petitioner with a copy of that memorandum.

conduit" (Pet. App. 11) is supported by substantial evidence and should not be disturbed. See *United States* v. *Jones*, 425 F. 2d 1048, 1058 (C.A. 9), certiorari denied, 400 U.S. 823.

2. Petitioner's claim of error in the instructions is founded upon the refusal of the trial judge to give overlapping charges offered by codefendant Greensphan (Pet. 18) that his payments to Yonan were not made with intent to defraud Zenith, but arose from threat of economic harm (loss of the Zenith contract). As the court of appeals noted (Pet. App. 13), the instructions were properly rejected because, in the circumstances of this case, the gossamer "threat" was not a defense. See *United States* v. *Cullen*, 454 F. 2d 386 (C.A. 7); *Dranow* v. *United States*, 307 F. 2d 545, 568 (C.A. 8). Moreover, to the extent that Greensphan's defense of economic coercion was entitled to consideration by the jury, it was safeguarded by instructions given as to intent, knowledge and willfulness in the face of Greensphan's testimony that he believed the payments were necessary to keep the valuable Zenith contract.

In any event the omitted instructions had no bearing upon petitioner, who was allied with Yonan rather than Greensphan. If Greensphan were a victim rather than a perpetrator of the fraud, petitioner's culpability would be undiminished. Accordingly, even if the failure to give Greensphan's instructions could be regarded as error, petitioner was not prejudiced thereby. See *Dranow* v. *United States*, *supra*, 307 F. 2d at 569.

3. At trial, the court admitted against Greensphan and Yonan evidence that Zenith's corporate policy forbade suppliers from giving gifts or things of value to purchasing department employees; that Yonan twice signed memoranda detailing this company policy; and that Greensphan

received copies of the policy statement. The evidence was admissible to show the codefendants' knowledge and breach of duties owed to Zenith. Petitioner's claim that this evidence might have been considered against him notwithstanding instructions to the contrary because the court later gave a charge on joint venture is speculative and remote. In light of the clear evidence of petitioner's role, which was unrelated to knowledge of Zenith's corporate policy, it is evident that petitioner's conviction did not depend upon whether the jury believed that he, too, was familiar with Zenith's rules. The claim of prejudice arising from proof of the conflict of interest policy is, therefore, insubstantial.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.